No. 16043

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERNARD STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant United States Attorney,
Chief, Criminal Division,

LEILA F. BULGRIN,
Assistant United States Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee,
United States of America.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

I.

Jurisdictional statement 1

II.

Argument 2

III.

Conclusion 9

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Brown v. United States, 222 F. 2d 293	2, 5
Fallen v. United States, 220 F. 2d 946	2
Kreinberg v. United States, 216 F. 2d 671	2
Pasadena Research Laboratory v. United States, 169 F. 2d 375, cert. den. 335 U. S. 853	3
Woodward Laboratories, Inc., et al. v. United States, 198 F. 2d 995	3

Statutes

United States Code, Title 18, Sec. 3231	1
United States Code, Title 21, Sec. 174	1, 2
United States Code, Title 28, Sec. 1291	1
United States Code, Title 28, Sec. 1294	1

No. 16043

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERNARD STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

This is an appeal from a judgment of conviction by the United States District Court for the Southern District of California which adjudged the appellant guilty on each of two counts of an indictment returned by the Grand Jury for the Southern District of California, which indictment was brought under the provisions of Section 174 of Title 21, United States Code.

The violations are alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California.

The jurisdiction of the United States District Court is based upon Section 3231, Title 18, United States Code. This court has jurisdiction to entertain this appeal and to review the proceedings leading to said judgment by reason of the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II.
Argument.

In connection with the appellant's contention that the evidence was not sufficient to establish a conviction under Count One of the indictment, this Court's attention is called to the fact that no motion for a judgment of acquittal was made by appellant before the trial court. It is clear that such a motion must be made at the end of the government's case and renewed at the end of the defense before alleged insufficiency of evidence can be urged before the Court of Appeals, except to prevent a manifest miscarriage of justice.

Fallen v. United States (1950), 220 F. 2d 946;

Kreinberg v. United States (1954), 216 F. 2d 671.

At any event, there is no merit in appellant's contention with respect to this point.

In connection with appellant's possession of the package of heroin involved in this case, the strongest inferences of constructive possession are shown by the record. That is sufficient to invoke the presumption of unlawful importation and knowledge thereof as set forth in the statute.

21 U. S. C., Sec. 174.

In *Brown v. United States,* 222 F. 2d 293 at 297, this Court said:

> "In *Mullaney v. United States,* 9 Cir., 1936, 82 F. 2d 638, 642, this Court approved an instruction of the trial court that 'possession of a thing means having in one's control or under one's domination.' It is not necessary that possession be immediate or exclusive. *Mullaney v. United States,* supra; *Borgfeldt v. United States,* 9 Cir., 1933, 67 F. 2d 967."

All of the evidence shows that appellant Stein had at least a constructive possession of the package of narcotics. It was definitely under his control and under his dominion prior to the time it was picked up by the agent. Of course, an Appellate Court will not resolve conflicts in the evidence nor pass upon the credibility of witnesses who appeared at trial, and this court will consider the evidence and all the fair and reasonable inferences that flow therefrom from the aspect most favorable to supporting the verdict of Judge William Byrne, as the trier of facts, and the judgment of conviction.

Woodward Laboratories, Inc., et al. v. United States (9th Cir., 1952), 198 F. 2d 995, 998;

Pasadena Research Laboratory v. United States (9th Cir., 1948), 169 F. 2d 375, 380, cert. den. 335 U. S. 853.

The evidence showed here that the preliminary arrangements were made for the sale of a quantity of heroin from Stein to Browning and that Browning later contacted Stein personally for the delivery and payment. Later, Browning went to Stein's apartment and it is uncontroverted that Stein walked out on the street with him. Then, according to the testimony of both Browning and the agent, Stein pointed to a package in the street which was proved to contain heroin at that time. In the interim before Browning came to his apartment and the two walked outside, Stein had plenty to time to either make the drop of narcotics himself near the curb at the street corner or to arrange for the package to be placed there by his connection. In either event, at the time he pointed to the package, Stein had it in his control and under his dominion within the definition of constructive possession.

The entire transaction ran true to form to the well-known facts surrounding the devious fashion used by those who negotiate for the illicit sale of heroin. The persons who engage in this traffic do not wish to be caught with the narcotics in their hand and devise many different schemes for the delivery of heroin by placing it at curbs or behind bushes or underneath trees or underneath the wheels of automobiles. It is submitted that no one could seriously contend that actual possession in the hand of the defendant would be necessary before a conviction, using the rule of evidence contained in the presumption, before a conviction could be obtained. If that were true, a "drop" underneath or beside or behind a convenient landmark, such as the curb in this case, would be sufficient to put the government on proof of importation and knowledge thereof. Certainly Congress did not intend that an obvious device, one used commonly in the illegal traffic of narcotics, should be without the purview of the presumption.

It is equally obvious that the trial court in this case believed the testimony of Browning and the agent as to the facts surrounding the negotiation of the sale of heroin, including the fact that Stein did point out the package containing the heroin to Browning. There is ample evidence to support the verdict of the court that Stein as a matter of fact had possession of the drugs within the purview of the presumption and therefore the conviction on Count One of receiving and concealing the heroin should be affirmed.

In passing, it appears the trial court was not concerned with the contention made about an absence of the appellant's fingerprints from the package. Anyway, such a point was only for the consideration of the trial court.

We might note that the transcript shows that *no* fingerprints were taken from the package [Rep. Tr. 133, 134]; not that there were other fingerprints on the paper but no fingerprints belonging to Stein. Even if the latter situation had existed, it was for the trial court to decide whether or not the defendant still had constructive possession of the package under the *Brown* case.

In conclusion on this point, the government submits to this court that the matters raised by appellant on the merits of his point in connection with possession were matters to be resolved by the trial court and that there is substantial evidence to support the judgment of conviction.

In connection with appellant's contention that a statement allegedly made by defendant to a narcotics officer was not free and voluntary, the government urges that this point is frivolous.

We might point out, in the inception, that the defendant had had several meetings with certain agents after the time of the transaction set forth in the indictment. The purpose of the meetings was obviously to secure cooperation from Stein because the officers believed that he had important connections in the illegal traffic of heroin. Even though there is some indication that a discussion was had with Stein as to the possibility of his not being prosecuted if he were cooperative, nothing ever came of it. At any event, there is no evidence that the purpose of the conferences were to get a confession or admission from the defendant. Further, the very words of the statement by appellant show it to be a spontaneous exclamation, a voluntary outburst on his part, not caused by any alleged arrangement.

Even so, there could have been no prejudice resulting to the defendant through this statement being admitted in evidence. Upon hindsight, it could actually be said that the statement was favorable to appellant. It could be interpreted as indicating that he had merely helped Browning in connection with his racing bets and, because of that, he had gotten into all this trouble. Perhaps it could be said that he was referring to his so-called friendship with Browning over a period of time. At any event, particularly with a court-tried case as was the instant matter, and with the strong evidence of appellant's guilt in connection with the concealment and sale of heroin, there was nothing in the alleged remark which could have prejudiced him in the Court's eyes in any way.

With respect to the contention that the case involved an unlawful entrapment, it is first submitted that the evidence did not show any such factual situation. The agent merely made the opportunity available to Stein to sell the heroin to Browning. The evidence does not show that the appellant was prevailed upon against his better judgment to make an isolated sale of narcotics. Secondly, the defense was not raised at trial. As counsel for appellant stated, in his brief, Stein had a prior conviction on a narcotics offense which was brought out only when the defendant took the stand. Obviously it was only used for the purpose of impeachment because the defense of entrapment was not brought to the court's attention at the time of trial. The government, therefore, had no opportunity to bring out all the knowledge the agent had as to the defendant's prior activities or criminal record. Such information would be available for the limited purpose of rebutting this defense. Appellant has attempted to secure unfair advantage against the government before

this court by endeavoring to have the matter raised at this time. The record indicates it is entirely possible that Agent Solomon knew of Stein's previous conviction [Rep. Tr. 101] and he may have known of other previous activities in the illegal traffic of narcotics, but the government should have had an opportunity to make a clear record before the trier of facts.

It should be noted that, as counsel for the appellant states, Stein *denied* in the trial court that the offense had been committed by him. In order to raise the defense of entrapment at the trial Stein would have had to admit the offense and then attempt to explain it away by trying to convince the Court or jury that an unlawful entrapment had been accomplished. However, the appellant now attempts to have the benefit of denying the crime before the trial court and then of raising the defense of entrapment before this court.

At any event, as stated above, the defense certainly would have had little persuasion upon the trial court at the time of trial. Appellant was merely offered an opportunity to make the sale which comprised a *lawful* "entrapment." The credibility of the witnesses was for Judge Byrne to resolve and his finding of a verdict of guilty on both counts should not be disturbed by this court where the evidence to support the conviction was sufficient.

Appellant's last point, that a continuance of the trial should have been granted by Judge Byrne, also borders on the frivolous. The record of this part of the proceedings is not before this court as yet, but appellee has been advised appellant is arranging to have it brought up. On cross-examination of the doctor, who was called by appellant to the stand in connection with his motion

for continuance, the government brought out that there was nothing much wrong with the appellant, except that he had had some trouble with his back and also had the normal nervous apprehension of any defendant who is brought to trial before the United States District Court. There was no showing that he was on the verge of a collapse and was unable physically to proceed to trial. In fact, the opposite was apparent after the doctor admitted that there was very little wrong with him. Counsel for appellant states that throughout the trial the defendant acted in a manner such as indicated he was ill. Such evidence is not before this court. If such an observation in that respect could be made at this time, government counsel would dispute counsel's assertion. In fact, as counsel for appellant has also stated, the defendant appeared throughout the trial on each occasion and, after the doctor was called, never again made any contention that he could not proceed nor did any problem arise which was brought to the attention of the court with respect to his health.

At any event, it is obvious that the denial of the motion for a continuance was not an abuse of discretion by Judge Byrne. There is not even any claim that a prejudice resulted to the defendant from the denial of the motion. There is no suggestion that any further evidence would have been developed or that somehow during the trial the proceedings were hindered by any state of facts whatsoever. The defendant took the stand to testify and there is no claim that he would have done any differently if the case had been delayed for any reason. Counsel for appellant states that "injustice can sometimes be done," but does not contend that injustice *was* done in this case.

III.
Conclusion.

That there is sufficient and substantial evidence to support the conviction on both Counts One and Two of the indictment; that the contentions raised by appellant are, or border upon, the frivolous; that there was no prejudice to the defense at any time during the trial or in the proceedings connected with the trial; and that the judgment of conviction below should be affirmed is respectfully submitted.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant United States Attorney,
Chief, Criminal Division,

LEILA F. BULGRIN,
Assistant United States Attorney,

Attorneys for Appellee,
United States of America.